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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 467

EDWARD HALLE, AS EXECUTOR OF THE ESTATE OF LOUIS HALLE, DECEASED, PETITIONER [1]

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 52-62) are reported in 7 T. C. 245. The opinion of the Court of Appeals (R. 281-287) is reported in 175 F. 2d 500.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1949. (R. 288.) The petitioner

[1] Upon the death of the taxpayer, Louis Halle, on January 4, 1949, while this case was pending on appeal, the court below entered an order on March 14, 1949, substituting Edward Halle, as executor of the estate of Louis Halle, deceased, as party petitioner. (Pet. 1-2.)

timely filed a petition for rehearing (R. 289), which was denied on July 1, 1949 (R. 303), and on September 12, 1949, this Court entered an order extending the time within which to file a petition for a writ of certiorari to November 26, 1949, inclusive (R. 304). The petition for a writ of certiorari was filed on November 26, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the court below correctly affirmed the Tax Court's findings and decision upholding the deficiencies in income taxes, and also the imposition of the 50% fraud penalties thereon under Section 293 (b) of the applicable statutes, as asserted against the taxpayer by the Commissioner for each of the taxable years 1929 to 1938, inclusive.

2. Whether the court below properly held that it was not reversible error for one judge of the Tax Court to hear this case and for another judge to write the opinion of the Tax Court.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra,* pp. 13-17.

STATEMENT

The facts were found by the Tax Court as follows (R. 53-56):

The taxpayer was a resident of New York City and was engaged in the practice of law during the

tax years involved herein. He and his wife, to whom he was married in 1914, filed joint returns for 1929,[2] 1936 and 1937. He filed separate returns for 1930 to 1935, inclusive, and 1938, the other tax years involved herein. His return for 1932 was filed with the Collector of Internal Revenue for the Second District of New York. The other returns were filed with the Collector of Internal Revenue for the Third District of New York. (R. 53-54.)

The taxpayer maintained one or more bank accounts in his own name during all the taxable years and in some of the years he maintained a brokerage account in his own name. Separate bank and brokerage accounts were maintained in the name of the taxpayer's wife during all of the taxable years. Securities purchased through the brokerage accounts were carried in the name of the wife. The taxpayer never acquired or owned any real estate or securities in his own name except in two instances not material hereto. Substantially all of the funds in the wife's bank and brokerage accounts during the years here in question were originally received by her from the taxpayer, except those which represented income or gain from investments. The money was given to her by the taxpayer from his earnings. The taxpayer gave many of the orders to buy or sell securities in his wife's

[2] This finding is erroneous in respect of the taxable year 1929, for the original record on review (Ex. B) shows that the taxpayer's return for that year was not jointly filed with his wife, as the taxpayer states (Pet. 15).

brokerage accounts. He frequently obtained money from his wife when he needed funds. (R. 54.)

Much of the taxpayer's income from the practice of law prior to 1934 was derived from representing persons charged with violation of prohibition laws. His income from that source dropped off somewhat after the repeal of the Eighteenth Amendment. (R. 54.)

The taxpayer spent more than $23,500 for living and other family expenses during 1934. (R. 54.)

The taxpayer, sometimes assisted by his stenographer, kept a loose-leaf book which shows some of his receipts and disbursements during the period beginning at some time in 1934. The loose-leaf book does not completely or clearly reflect the taxpayer's income for that period. He has no records showing any receipts and disbursements prior to 1934. He personally prepared his returns up to the return for 1934 at which time an accountant began to prepare his returns from information furnished by the taxpayer. The accountant did not examine any books or records of the taxpayer. (R. 54-55.)

The Commissioner for each year added to the taxpayer's income as shown on his return, *inter alia*, an item entitled "gross income from business understated." The Commissioner, in determining that those amounts represented additional gross income, examined the bank accounts and brokerage accounts of the taxpayer and his wife. He found

the total amounts deposited in the taxpayer's accounts with those banks and brokers and the amounts in the wife's accounts which came from the taxpayer. He eliminated all duplications, all amounts which could be identified as not representing income of the taxpayer, and all portions of the totals which had been reported as income by the taxpayer. The total net increase in the taxpayer's wealth for each year as thus disclosed was the amount which he added to the taxpayer's income for the year. (R. 55.) The following table shows the net income reported on the returns for the years here in question, the gross income from the taxpayer's business reported on those returns, and the additional gross income from his business which was not reported on those returns (R. 55, 56):

Year	Net Income Reported	Gross Income From Business Reported	Additional Income From Business Not Reported
1929	$25,600.56	$34,110.00	$ 51,750.87
1930	27,785.67	47,168.34	139,069.72
1931	28,497.67	29,497.67	166,056.53
1932	17,809.68	40,654.00	100,222.45
1933	16,778.68	39,875.00	36,138.59
1934	6,500.38	31,356.28	48,487.77
1935	6,992.12	24,866.87	50,268.10
1936	2,451.44 (loss)	9,167.53	41,873.23
1937	6,223.06	8,107.65	36,251.70
1938	7,926.63	19,380.70	27,755.62

The statutory period for assessment and collection of additional taxes for the years 1936, 1937 and 1938 was extended until June 30, 1945, by waivers signed by the parties. (R. 56.)

The notice of deficiencies was mailed on September 29, 1943. (R. 56.)

Each return filed by the taxpayer or by the taxpayer and his wife for the years 1929 to 1938, inclusive, was false and fraudulent with intent to evade tax. (R. 56.)

A part of the deficiency for each year was due to fraud with intent to evade tax. (R. 56.)

Upon the basis of these facts, the Tax Court, affirming the Commissioner's determinations in large part for all taxable years involved (R. 9-34), held that the taxpayer had failed to sustain his burden of proving that the Commissioner's determinations were erroneous, and that the Commissioner had fully sustained his burden of proof on the fraud issue for each taxable year (R. 56-62). The court below affirmed, and held further that it was not reversible error for a judge other than the one who heard the case to write the opinion of the Tax Court. (R. 283-287.)

ARGUMENT

This case presents no question calling for review by this Court. The only reason asserted by the petitioner for allowance of the writ (Pet. 17-18) is that the Tax Court and the Court of Appeals have set a harmful precedent in finding fraud solely on the basis of the presumption of correctness attaching to the Commissioner's determination, rather than on the evidence. The opinions of both lower courts fully disclose that there is no support for the assertion that the findings are not based on evidence.

1. The Commissioner's determination of defi-

ciencies and fraud penalties resulted from the fact that the taxpayer and his wife made large deposits in their bank and brokerage accounts in each of the ten taxable years, which were in excess of the income reported by the taxpayer on his return for each year. (R. 11-34, 54-56, 59, 60-61.) The funds deposited in the wife's accounts came originally from taxpayer's earnings except small amounts representing the wife's income and gains from investments. (R. 54, 61, 95-96, 109, 113, 115, 131, 193, 198, 265.) The testimony of the Revenue Agent who made the examination established that the unreported deposits included in income for each year were determined by eliminating, on the basis of all available records and data, all duplications, all amounts identifiable as not representing income of the taxpayer, and all amounts which had been reported as income by the taxpayer.[3] (R. 148-189, 231-255.) The taxpayer introduced no evidence sufficient to indicate that the unreported deposits were not income. As the court below put it (R. 284-285):

> Against this background, taxpayer and his wife introduced little or no genuine evidence to explain the large sums of money deposited in

[3] The Commissioner conceded in the Tax Court two additional items, aggregating more than $50,000, as not clearly representing understated income for 1931 and 1934, respectively, even though the larger item of $49,149.90 for 1934 was unsatisfactorily explained (R. 112, 124-126, 185-187, 241-242, 263-264), and the Tax Court gave effect thereto in making its findings and decreased the deficiencies accordingly for those years (R. 56, 57, 64).

> the bank and brokerage accounts. The answers of taxpayer and his wife as to items involving large sums of money were halting, inconclusive and evasive. * * * Often, when called on to explain important items involving substantial sums of money, taxpayer resorted merely to a general statement that his returns were true and correct.

Examination of the record will fully support the appellate court's description of this testimony (e.g., R. 56-57, 60, 78-79, 95-96, 109, 112-116, 173-174, 193-197, 200-207),[4] and this despite the fact that the Tax Court had admonished the taxpayer that he had the burden of proof on the substantive issues on which the deficiencies were based (R. 80-81). Nor had he maintained adequate books and records. (R. 55.)

Without reviewing the evidence in detail, it is clear that on the record the Tax Court made the only possible findings, namely, that the unreported deposits were the taxpayer's income as the Commissioner had determined, and that the omission of these amounts from the taxpayer's returns in the taxable years was due to fraud with intent to evade tax. The taxpayer's failure to rebut the Commissioner's evidence as to the unreported deposits, coupled with the consistent omission of these large

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[4] The taxpayer testified that "my returns covered all of my income" for the taxable years involved (1929-1938), and that "the returns as filed are correct." (R. 81.) In the absence of any more convincing evidence, therefore, his "silence then became evidence of the most convincing character." *Interstate Circuit* v. *United States*, 306 U. S. 208, 226.

amounts by taxpayer from income, certainly warranted, and even necessitated, the finding of fraud.

The Tax Court's findings with respect to the understatement by the taxpayer of his income in the taxable years and his fraudulent intent are questions of fact. *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40. Since these findings are fully supported by the record, the Court of Appeals correctly affirmed the deficiencies and fraud penalties found by the Tax Court.

The decisions cited by the petitioner (Br. 29-31, 36-37) involved different factual situations and are not in any way in conflict with that in the instant case. Indeed, the petitioner does not assert a conflict. Thus, in *Helvering* v. *Taylor,* 293 U. S. 507 (Br. 34), the evidence had established that the Commissioner's determination of income was arbitrary and excessive but did not show the correct income and tax liability. This Court held that remand to the Board of Tax Appeals, for the taking of additional evidence as to the correct tax liability, was proper. In the present case the Commissioner's determination of deficiencies and fraud penalties was not arbitrary and excessive. On the contrary, although on notice of his burden of proof, the taxpayer wholly failed to show that the Commissioner's determination of his income was excessive.

2. The Court of Appeals correctly held that it was not reversible error for one judge of the Tax

Court to hear the case and another judge to make the findings of fact and write the opinion. The statutory provisions governing procedure in the Tax Court clearly show that this was not error. Under Section 1103 (c) of the Internal Revenue Code (Appendix, *infra*, pp. 14-15) the presiding judge of the Tax Court has full authority to assign one or more judges to a division and to fill vacancies occurring in the division thereafter. The division is required by Section 1118 (Appendix, *infra*, pp. 16-17) to hear a proceeding assigned to it by the presiding judge and to make a report, consisting of findings of fact and opinion (Section 1117 (Appendix, *infra*, pp. 15-16)) thereon, to the whole Tax Court. The division's report becomes the report of the Tax Court after the lapse of 30 days unless within that time the presiding judge directs that the report shall be reviewed by the whole court. Thus, Congress provided for the assignment of another judge to fill a vacancy in a division assigned to hear and report a case to the full court, in precisely the manner that was followed here. The fact that the vacancy occurred and was filled after the hearing is immaterial, since the statute sets out no limitations on the filling of a vacancy in the division. Indeed, Section 1118 (b) (Appendix, *infra*, pp. 16-17) confirms this conclusion, since the authority given for review by the whole Tax Court (sixteen judges) necessarily means that most of the judges who participate in the Tax Court's report will not have

seen and heard the witnesses. The transcript of the evidence introduced at the hearing was, of course, available to and was used by the substituted judge in making his report.

Not only does the statute authorize the practice of the Tax Court in this situation, but appellate courts have recognized that it is not essential to the validity of the decision of the Tax Court that the judge who makes the findings and writes the opinion shall have seen and heard the witnesses. *Seaside Improvement Co.* v. *Commissioner,* 105 F. 2d 990, 992 (C.A. 2d), certiorari denied, 308 U. S. 618; *Davidson* v. *Commissioner,* 91 F. 2d 516, 518 (C.A. 5th); *Foss* v. *Commissioner,* 75 F. 2d 326 (C.A. 1st); *Garden City Feeder Co.* v. *Commissioner,* 75 F. 2d 804 (C.A. 8th); *Powell* v. *Commissioner,* 94 F. 2d 483, 485-486 (C.A. 1st); cf. *Banister* v. *Solomon,* 126 F. 2d 740, 741-742 (C.A. 2d); *Standard Oil Co.* v. *United States,* 7 F. Supp. 301 (C. Cls.), certiorari denied on other grounds, 293 U. S. 599.

As the court below stated (R. 287), the cases relied on by the taxpayer (Br. 41-43) contain nothing at variance with the above principles. Thus, *Jewett & Co.* v. *Commissioner,* 61 F. 2d 471 (C.A. 2d), and *Commissioner* v. *National Carbide Corp.,* 167 F. 2d 304, 307 (C.A. 2d), affirmed, 336 U. S. 422, involved entirely different factual situations and questions. *Foss* v. *Commissioner,* 75 F. 2d 326 (C.A. 1st), recognized the rule stated above, although it reversed the Tax Court for other reasons not applicable here. *S. Buchsbaum & Co.* v. *Fed-*

eral Trade Commission, 153 F. 2d 85 (C.A. 7th) remanded, 328 U. S. 818, re-decided on the merits, 160 F. 2d 121, did not involve the Tax Court and the statutory provisions governing it, and is consequently inapplicable. Moreover, that case involved a factual situation different from that here presented.

CONCLUSION

The decision of the court below is in all respects correct, turns on the particular facts of this case and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JANUARY, 1950.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 276. SAME.—EXCEPTIONS.

(a) *False return or no return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) *Waivers.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent

agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 22 (a), 276 (a) and (b), and 293 (b) of the Revenue Acts of 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447) contain provisions which are identical with the corresponding sections of the Revenue Act of 1928, above quoted.

Internal Revenue Code:

SEC. 1103. ORGANIZATION.

* * * * *

(b) *Designation of Chairman.*—The Board shall at least biennially designate a member to act as chairman.

(c) *Divisions.*—The chairman may from time to time divide the Board into divisions of one or more members, assign the members of

the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1103.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.[5]

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

(26 U.S.C. 1946 ed., Sec. 1112.)

SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Board and a de-

[5] The forerunner of this section was Section 907 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, as added by Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and amended by Section 601 of the Revenue Act of 1928, which provided as follows:

SEC. 907. (a) * * *. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. * * *.

cision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1117.)

SEC. 1118. PROVISIONS OF SPECIAL APPLICATION TO DIVISIONS.

(a) *Hearings, Determinations, and Reports.*—A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) *Effect of Action by a Division.*—The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be

subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

(26 U.S.C. 1946 ed., Sec. 1118.)

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